IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
October 23, 2007 Session

LEIGH HEMBREE and husband, CHRISTOPHER D. HEMBREE v. THE ESTATE OF RICHARD STYLES, et al.

Direct Appeal from the Circuit Court for Cocke County
No. 30,146 - III Hon. Rex Henry Ogle, Circuit Judge

No. E2006-02629-COA-R3-CV - FILED DECEMBER 17, 2007

An action against "The Estate of Richard Styles" was dismissed by the Trial Court on grounds of the statute of limitations. We affirm.

Tenn. R. App. P.3 Appeal as of Right; Judgment of the Circuit Court Affirmed.

HERSCHEL PICKENS FRANKS, P.J., delivered the opinion of the court, in which CHARLES D. SUSANO, JR., J., and D. MICHAEL SWINEY, J., joined.

David C. Lee, Knoxville, Tennessee, for appellants.

Louis Andrew McElroy, II., Knoxville, Tennessee, for appellee.

OPINION

Background

Plaintiffs brought this action on May 17, 2006 against the Estate of Richard Styles and Chad Hance, for damages for injuries received by Ms. Hembree in a motor vehicle accident.

Plaintiffs alleged that Ms. Hembree was riding as a passenger in a vehicle owned by Styles and was being driven by Hance, who was under the influence, and that Hance lost control of the vehicle and struck a tree, resulting in severe injuries to Ms. Hembree. Styles was killed in the accident.

Plaintiffs alleged that Styles' estate was liable for negligent entrustment, because Styles knew that Hance was intoxicated when he allowed him drive the vehicle. Subsequently, plaintiffs amended their Complaint to add Vernon Hudson, d.b.a. The Back Way Inn, as a defendant, and alleged that Hudson was negligent in serving alcohol to Hance, who was only 19 years old.

After filing of a Special Notice of Appearance, for the sole purpose of contesting jurisdiction over the "Estate of Styles", and to assert a defense of insufficiency of process/service, the "Estate" then filed a Motion to Dismiss, asserting that no estate was ever opened for Richard Styles, and that there was no entity known as the Estate of Richard Styles. The "Estate" also stated that no Administrator Ad Litem had been appointed, and thus the suit had not been filed properly, as was required by statute. The "Estate" further argued that since the accident occurred on June 18, 2005, the statute of limitations had run and that the case should be dismissed as to that defendant.

Plaintiffs responded, asserting that the Probate Court of Cocke County had appointed Connie Taylor as Administrator Ad Litem on behalf of the Estate of Richard Styles on May 17, 2006, and attached a copy of the Order appointing Ms. Taylor as Administrator Ad Litem.

The "Estate" then filed another Motion to Dismiss, stating that plaintiffs' attorney had his employee appointed as the Administrator Ad Litem for the "Estate", and that she would clearly not have the best interests of the "Estate" as her priority. Defendant stated that the summons for the "Estate" was actually issued to Mr. Styles' mother, and was served on her on May 19, 2006, rather than the Administrator Ad Litem, and stated that when the Complaint was amended, another summons was issued for the "Estate" and was once again served on Styles' mother, rather than Taylor. Defendant further stated that no summons was issued to the Administrator Ad Litem until July 11, 2006, which was more than one year from the date of the accident.

Plaintiffs responded by filing an Affidavit of Connie Taylor, who stated that she was appointed Administrator Ad Litem for he Estate of Richard Styles on May 17, 2006, that she had been served with the Complaint and Amended Complaint, and that she knew about same even before they were filed, since she was working for plaintiffs' counsel. She further stated that she now worked for a different law firm, and asked to be relieved of her duties as Administrator.

The Trial Court entered an Order of Dismissal of the Estate of Richard Styles, and attached and incorporated its Memorandum Opinion. In that Opinion, the Court found that the accident in question occurred on June 19, 2005, that the Complaint was filed on May 17, 2006, and that the Administrator Ad Litem was appointed on that date. The Court found that there had been no return of service ever filed showing that the summons was served on Ms. Taylor. The Court found that summons were served on different members of the Styles family, and that an alias summons was issued to Ms. Taylor on July 12, 2006, but the statute of limitations had run prior to that time. The Court also found that appointment of a paralegal in the office of plaintiffs' counsel was "totally inconsistent with the policy of law and statutes relating to the administrator ad litem in that the administrator ad litem's interest was so contrary to any of the deceased's family". The Court found the administrator should act independently of the plaintiff.

Plaintiffs filed a Rule 60 Motion seeking to set aside the order of dismissal, and attached documentation showing that the summons for the Estate was served on Ms. Taylor as Administrator Ad Litem via certified mail, on July 17, 2006.

The issues presented on appeal are:

1. Did the Trial Court err in dismissing the Estate for lack of service of process?

2. Did the Trial Court err in overlooking the return of service signed by Ms. Taylor's husband on her behalf?

3. Did the Trial Court err in overlooking Ms. Taylor's affidavit wherein she stated that she had been served with process?

4. Did the Trial Court err in dismissing the Estate because plaintiffs' counsel obtained the appointment of his paralegal to serve as administrator ad litem?

5. Did the Trial Court err in stating that the administrator had to act independently of the plaintiff, despite the plain language contained in *Estate of Russell v. Snow*, 829 S.w.2d 136 (Tenn. 1992)?

Discussion

As appellee points out, Tenn. Code Ann. §20-5-103 states that a cause of action in tort shall survive the tort-feasor's death, and may be prosecuted against the personal representative of the tortfeasor. As our Supreme Court has explained:

> A suit asserting a cause of action preserved from abatement by [Tenn. Code Ann. §20-5-103] can be brought only against the personal representative of the decedent. A personal representative of a deceased tortfeasor must exist before a right of action for tort is ripe for enforcement. *Brooks v. Garner*, 194 Tenn. 624, 254 S.W.2d 736, 737 (1953); *Goss v. Hutchins*, 751 S.W.2d 821, 824 (Tenn. 1988). Therefore, when there is no personal representative of the deceased tort-feasor upon whom process can be served, the plaintiff is entitled to have appointed an administrator ad litem pursuant to T.C.A. § 30-1-109, which provides, as follows:
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> (a) In all proceedings in the probate or chancery courts, or any other court having chancery jurisdiction, where the estate of a deceased person must be represented, and there is no executor or administrator of such estate, or the executor or administrator thereof is interested adversely thereto, it shall be the duty of the judge or chancellor of the court, in which such proceeding is had, to appoint an administrator ad litem of such estate for the particular proceeding, and without requiring a bond of him, except

> in a case where it becomes necessary for him to take control and custody of property or assets of the estate of his intestate, when he shall execute a bond, with good security, as other administrators are required to give, in such amounts as the chancellor or judge may order, before taking control and custody of such property or assets.
>
> (b) Such appointment shall be made whenever the facts rendering it necessary shall appear in the record of such case, or shall be made known to the court by the affidavit of any person interested therein; and, in such proceedings in the chancery court, the chancellor at chambers or clerk and master of such court on
> a rule day shall have authority to make such appointment in vacation.
>
> This Court has held that since an administrator ad litem is appointed for a special and limited purpose, it may precede the appointment of a general administrator and the two administrations may subsist together. *McKamy v. McNabb*, 97 Tenn. 236, 36 S.W. 1091 (1896). On the same principle, the special administration may occur after the general administration has been completed. The purpose of the administration is not determinative so long as it meets the statutory requirement that "the estate of [the] deceased person must be represented." T.C.A. § 30-1-109(a). In the case before the Court, the right of the plaintiff to pursue his action against the deceased tortfeasor is dependent upon the appointment of an administrator ad litem. Under the statutes, he is entitled to that appointment.

Estate of Russell v. Snow, 829 S.W.2d 136, 138 (Tenn. 1992).

As plaintiffs argue, it was proper for them to seek appointment of an administrator ad litem for the purpose of filing their tort claim against the estate of the deceased. However, plaintiffs did not then proceed to file a claim and serve process against the personal representative, i.e. the administrator ad litem that they had appointed. Rather, plaintiffs filed their claims against the "estate" and served process on decedent's mother, who was not the personal representative. The Supreme Court has made clear that Tenn. Code Ann. §20-5-103 abrogates the common law rule that a tort claim abated at the death of the tortfeasor, and thus the procedures in the statute must be strictly followed. *Brooks v. Garner*, 254 S.W.2d 736 (Tenn. 1953). The procedures were not strictly followed in this case.

Plaintiffs argue that *Goss v. Hutchins*, 751 S.W.2d 821 (Tenn. 1988) supports their position, because in that case the Supreme Court held that naming only the "estate" in the caption of the complaint was not fatal to the action, if the body of the complaint made clear that the suit was actually brought against the personal representative of the estate. However, in that case, the body of the complaint contained allegations demonstrating that suit was actually being brought against the personal representative, and further, the personal representative was timely served with process. *Id.* The Court stated that the estate itself was not a proper party defendant in that case.

In this case, the body of the Complaint did not make any allegations regarding the personal representative of the estate (even though plaintiffs' counsel had an administrator ad litem appointed on the same day the Complaint was filed). Both the caption and the body of the Complaint only speak in terms of the estate, which is not a proper party defendant pursuant to the above authority. There is nothing in the Complaint to indicate that a personal representative existed, nor that suit was brought against that person. Moreover, the personal representative of the estate was not timely served with process, according to the summons contained in the Supplemental Record, and not in compliance with the procedural requirements of Tenn. R. Civ. P. 4, fn.1.[1] We conclude the Trial Court correctly dismissed the claims against the "estate".

Plaintiffs argue that defendant has waived this defense, once again relying on *Goss*. In *Goss*, the Court stated (in addition to the above) that the estate could not raise the argument regarding capacity of the estate to be sued without making specific averments in its pleadings regarding same, pursuant to Tenn. R. Civ. P. 9.01. *Id.* Rather, the estate in that case averred that the complaint failed to state a claim upon which relief could be granted. *Id.* In this case, however, the Motions to Dismiss filed by defendant were directed toward the estate's capacity to be sued. We find this argument to be without merit.

Finally, plaintiffs' counsel takes issue with the Trial Court's holding "as a matter of law that the administrator ad litem must act, at minimum, independently of plaintiff", and that the appointment of plaintiffs' counsel's paralegal as administrator ad litem was inappropriate. Since we have held that the "estate" was not a proper party defendant, we pretermit this issue and affirm the Trial Court's dismissal of this action.

The cost of this appeal is assessed to the plaintiffs, and the cause remanded.

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HERSCHEL PICKENS FRANKS, P.J.

[1] Plaintiffs argue that Ms. Taylor's affidavit should be accepted as proof of timely service of process, but a review of the affidavit, shows that Ms. Taylor merely states that she was served with the complaint and amended complaint, but does not state when she was served, or by what method.